IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.

LETTERS PATENT APPEAL NO.316 OF 1998.
IN

FIRST APPEAL NO. 352 OF 1986.

Punnakatu Chery Joseph Thankappan... Appellant.
vs.
Pyarali Hirji Hamid. ... Respondent.

Mr. B.H.Vyas for the Appellant.

Mr.V.Y. Sanglikar for the respondent.

CORAM: S.B. MHASE AND
R.S. MOHITE,JJ.

DATE : 14th October 2004.

ORAL JUDGMENT (PER R.S. MOHITE,J.)

1. This Letters Patent Appeal is filed by the appellant, defendant, (hereinafter referred to as the defendant') against the respondent, plaintiff ('hereinafter referred to as the Plaintiff'), impugning the judgment and order passed by the learned Single Judge of this Court dated 8.10.1998 in First Appeal No. 352 of 1986, by which order, the learned Single Judge has dismissed the appeal and confirmed the judgment and decree passed by the City Civil Court, Bombay, in S.C. Suit No.3615 of 1963, thereby allowing claim of the plaintiff for possession of the suit premises.

2. The brief facts of the case are as under.

a). That the suit premises consists of a flat bearing Flat No. 7-92(5), situated on the 3rd floor in a building known as Printing House, 24A and 28D, Police Court Lane, Fort, Bombay. It is an admitted position that the suit premises were owned by one Charles Neukon. It is also an admitted position that one Ramswamy was inducted as a tenant in the suit premises by the original landlord Mr. Charles Neukon.

b). One M/s New Karnataka Printing and Publishing House Ltd., which was a Public Limited Company, took over the business of printing from Mr. Charles Neukon in 1946 and the business was purchased as a running and going concern together with the business premises which are the present suit premises,

c). That after plaintiff took over the business as aforesaid, the original tenant Ramswamy continued to occupy the suit premises, as a monthly tenant. The monthly rent of the suit premises was fixed at Rs. 32.55 per month.

d). It was the case of the plaintiff that Ramswamy

was always irregular in payment of rent. He was also not staying in the suit premises, but used to allow other persons to occupy the same from time to time. That as the suit premises were illegally transferred by the tenant Mr. Ramswamy, the Controller of Accommodation had requisitioned the same by an order dated 20.3.1958. The said order of requisition had remained in force till 5.5.1958, on which day, the suit premises were derequisitioned by the Controller of Accommodation. That after derequisition, the suit premises were again occupied by the old tenant Mr. Ramswamy and he continued to occupy the suit premises till August 1960. That some time in August 1960, Ramswamy abandoned the premises, leaving it in possession of the defendant. On 24th September 1960, the defendant addressed a letter to M/s New Karnataka Printing and Publishing House Ltd., enclosing therewith a copy of a declaration said to have been made by the tenant Mr.Ramswamy and further enclosing a cheque for the amount of Rs. 32.55 towards payment of rent for the month of August 1960. By the said letter, defendant applied for transfer of tenancy bill in respect of the suit premises to his name. The defendant contended in the said letter that he was in possession of the suit premises since 1958.

M/s New Karnataka Printing and Publishing House Ltd. replied the said letter through their advocate's letter dated 9.10.1960. They denied all the contentions of the defendant and refused to transfer the rent bills in his name. M/s New Karnataka Printing and Publishing House Ltd. then filed S.C. Suit No. 3615/1963 in the Bombay City Civil Court at Bombay, on 31.7.1963 for a decree directing the Defendant, his servants and agents to vacate and remove himself from the suit premises and for handing over vacant and peaceful possession of the same. In the said suit, a decree was sought directing the defendant to pay an amount of Rs. 1171.80 as and by way of compensation to the plaintiff for unauthorised use and occupation of the suit premises from 7.8.1960, till the date of filing of the suit. Further compensation at the rate of Rs.5/- per day was also sought.

e). On being served with summons, the defendant appeared and filed his written statement on 8.4.1964. It was the case of the defendant that he was a lawful sub-tenant of the original tenant- Ramswamy, duly protected under the Bombay Rent Act. He submitted that he came to reside in the suit premises in the

year 1955 and later on the original tenant left the suit premises for good, leaving the same in his exclusive possession from 1958. He contended that he brought his wife from his native place and since 1958 onwards he had been residing with his family in the suit premises. He submitted that his name along with the name of his wife was recorded in the electoral roll in or the month of January 1959, for electoral purpose based on this fact that his name was included in the electoral roll in force from 20th December 1960 to 19th December 1964.

f). The plaintiff purchased the suit premises during the pendency of the suit and got himself impleaded in place of the original plaintiff New Karnataka Printing and Publishing House Ltd., by an amendment dated 5.10.1982 carried out in pursuance of the order of the City Civil Court dated 27.9.1982.

g). At the stage of trial, the plaintiff examined one Venugopal Amembal, who was the Secretary of the plaintiff-Company as his first witness. He also examined one Razak Naik, an Accommodation Inspector, General Administration Department in the State of Maharashtra. On examination of these two witnesses,

the plaintiff closed his case.

h). At the trial, the defendant examined himself as DW 1. He also examined one Trecy Gobeas, who was the neighbour of defendant, as DW 2. The defendant then closed his case.

i). Upon consideration of the oral and documentary evidence led and produced by both sides, by a judgement and decree dated 25.2.1986, the learned Judge of the City Civil Court, Bombay, was pleased to decree the plaintiff's suit and direct the defendant to deliver vacant and peaceful possession of the suit premises and to pay to the plaintiff an amount of Rs.1171.80 as compensation for use and occupation of the suit premises from 1st August 1960 till 31st July 1963.

j). In the judgment and order, the trial Court came to the conclusion that the plaintiff has proved that the defendant was a trespasser on the suit premises. That the defendant has failed to prove that he was a lawful sub-tenant in the suit premises. It was held that the plaintiff was entitled to mesne profits though, not at the rate claimed. The trial Court

further held that jurisdiction of the civil Court was not barred by section 28 of the Bombay Rent Act.

k) Being aggrieved by the judgment and decree passed by the trial Court, the defendant filed First Appeal No. 352 of 1986 before the learned Single Judge of this Court. The said appeal was dismissed by the learned Single Judge of this Court by a judgment and order dated 8.10.1998. The learned Single Judge concurred with the findings recorded by the trial Court while dismissing the appeal for the reasons stated in the judgment.

l) The defendant then filed the present Letters Patent Appeal in December 1998 in this Court against the concurrent findings of the trial Court and of the learned Single Judge of this Court.

2. We have heard learned Counsel for both the sides at length and perused the entire record. We find that the reasons and conclusions reached by the trial Court and confirmed by the learned Single Judge are cogent and logical and that there is no substance in the appeal for the following reasons.

3). In support of his case of the defendant that he was sub-tenant, the defendant had put himself in the witness box. In his examination-in-chief, he stated that he had come to Bombay in search of service in April 1949. That he was putting up with his friend Shri Pillai till 1955. One Francis used to come to the house of Pillai as he was a friend of Pillai. He struck an acquaintance with Shri Francis. The defendant learnt from Francis that he was staying at the place of Shri Ramswamy who was the tenant in the suit premises That in the year 1945, he started residing in the suit premises as a boarder of Shri Ramswamy . That he married on 30.9.1958 and since he was in need of accommodation for his family, he requested Shri Ramswamy to provide him accommodation and in pursuance of the said request, Shri Ramswamy put him in exclusive possession of the suit premises. He produced certain documents to show his possession after October 1958, such as letters received by him at the suit premises and other documents to indicate that a female child was born to his wife in the year 1958, when he was residing at the suit premises. In his cross-examination, the defendant stated that he had informed the tenant Shri Ramswamy in September 1958, that he was to be married on 29.9.1958 and that

he would be bringing his wife to reside with him in the suit premises. That upon his request, Shri Ramswamy had asked the other boarders to leave his room. That he returned to Bombay after his marriage with his wife in October 1958, and by that time, Ramswamy had left the suit premises and kept the keys to the premises with his cousin brother by name Angelo. That thereafter the defendant started residing in the suit premises with his wife and since then he is in exclusive possession of the suit premises. He denied that Ramswamy continued to occupy the suit premises till August 1960. His witness Tracy deposed only in relation to the defendant's possession of the suit premises in the year 1958. Her evidence is of little use to the defendant to decide as to whether the possession of the defendant was in the capacity of a sub-tenant of Shri Ramswamy.

4. The learned Counsel appearing for the defendant contended that there was sufficient documentary evidence on record to indicate that the defendant was in possession of the suit premises as a sub-tenant prior to the 1959 amendment to the Bombay Rent Act. He contended that by virtue of the said amendment a

person who was in possession of the premises on 21st May 1959 was deemed to be protected sub-tenant. He contended that protection to unauthorised sub-tenancy was further extended by Maharashtra Act 18/1987 and such sub-tenants who were in possession on 1st February 1973 were also protected.

5. As against this, the learned Counsel appearing for the plaintiff submitted that the basic requirement for protection under the Bombay Rent Act was that the person in occupation must be a sub-tenant. If sub-tenancy itself was not proved, the question of being protected by virtue of section 15 of the Bombay Rent Act did not arise at all.

6. We find that though the defendant stepped into the witness box, he did not state in his examination-in-chief that he had requested for grant of sub-tenancy to the original tenant Shri Ramswamy. He admitted that his possession of the suit premises in the year 1955 was as a boarder, who was paying for his food. From the said admission, it was clear that the defendant was originally a paying guest. He stated in his evidence that he requested Shri Ramswamy to allow him to occupy the suit premises

along with his wife and that this request was acceded to by Shri Ramswamy, who left the premises even prior to the defendant's returning back to Bombay with his wife in October 1958. He nowhere stated that he requested Ramswamy that he may be allowed to occupy the suit premises as a sub-tenant. In his evidence he made no reference to the amount of rent which was agreed between him and Shri Ramswamy. Neither his pleadings nor his evidence refers to any payment of rent being made by the defendant to Ramswamy. In our view,, fixation and payment of rent which is consideration in lieu of tenancy or sub-tenancy is absolutely essential element in order to evidence the existence of such tenancy/sub-tenancy. In the absence of such pleading or evidence on record, it will not be possible to hold that defendant was a sub-tenant of Ramswamy and thus, the protection afforded under section 15 of the Bombay Rent Act, as amended from time to time, would enure to the benefit of the defendant.

7. The defendant relied upon a letter dated 24.9.1960 addressed to the original plaintiff New Karnataka Printing & Publishing House Ltd. In this letter, the defendant contended that he was occupying

the premises since October 1958. He annexed a declaration dated 30th June 1960, said to have been made by Shri Ramswamy to the effect that he had no interest in the tenancy of the said flat and had no objection in issuing rent receipts in the name of the defendant. He requested that the rent receipts in future be given to him and he enclosed cheque for payment of rent for the month August 1960. We find that even in the said letter, defendant made no claim to have become sub-tenant of Shri Ramswamy. In so far as the declaration dated 9.10.1960 is concerned, though the original was produced by the plaintiff since it had been enclosed along with letter, defendant made no attempt to examine Shri Ramswamy in order to prove the truth of its contents. Though in the declaration there is a reference that the suit premises has been sublet to the defendant in October 1958, there is no reference to payment of any rent to Shri Ramswamy since October 1958. In our view, from the record it appears that only the signature of the tenant on this document has been proved and that also during the cross-examination of the plaintiff's witness. Truth of contents of this document has not been proved. Apart from this, the document appears to be a suspicious document. It has been sworn on a

stamp paper of Rs.3/- which has been issued to one Shri D.S.Deodhar, Advocate and is said to have been executed before one Bachubhai Thakordas Merchant, Notary, State of Maharashtra. The defendant did not examine Shri B.T. Merchant, Notary, in order to prove that the said declaration was in fact executed before him. The defendant has also not explained in his evidence how the stamp paper issued to Shri D.S. Deodhar, Advocate came into his custody. Advocate Shri D.S. Deodhar was not examined as a witness. The said advocate was not Advocate for the parties in the proceeding before the Court. In view of the declaration being a suspicious document, we are left with mere statements of the defendant that the suit premises were sublet. In the absence of evidence, it would not be possible to conclude that the possession of the defendant was that of a protected sub-tenant.

8. The net result of the aforesaid discussion is that the conclusion reached by the trial Court and the learned Single Judge to the effect that the possession of the defendant was that of a trespasser, appears to be correct and acceptable.

9. Permission to occupy was also granted not by the

landlord but by the tenant which was not permissible at the relevant time. In the circumstances, there is no substance in the appeal and the same is dismissed.

10. Learned Counsel for the defendant requests the Court that the impugned decree should not be executed for a period of 8 weeks. Learned Counsel for the plaintiff, after taking instructions from the plaintiff, who is present in Court, undertakes not to execute the decree for a period of 8 weeks from today, provided the defendant does not create any third party interest in the suit premises. The said undertaking is accepted. The defendant is directed not to create any third party interest in respect of the suit premises or any part thereof.

Certified copy expedited.

(R.S.MOHITE,J.) (S.B. MHASE,J)